IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 6 OF 2021

(Originating from CMA/KLM/MOS/ARB/28/2020)

CATHOLIC DIOCECE OF MOSHI .....APPLICANT

VERSUS

NICKSON NELSON MUNISI & ANOTHER ..... RESPONDENTS

JUDGMENT

MUTUNGI .J.

The Applicant has herein filed an application for Revision to challenge the decision of the Commission for Mediation and Arbitration of Moshi by Mwakyusa L. L. The Application has been brought by Chamber Summons under **section 91(1)(a),91(2)(a)(b)(c) and section 94(1)(b)(i) of the Employment and Labour Relations Act No.6 of 2004 read together with Rule 24(1) and 2(a),(b),(c),(d),(e) and (f), and rule 24(3)(a),(b),(c)and(d) and rule 28(1)(a),(c),(d) and (e)of the Labour Court Rules 2007 G.N No.106 of 2007).**

The Application is supported by an affidavit of Tumaini Materu the Applicant's advocate, countered by a Counter Affidavit filed by the Respondent. The gist of this application as collected from the affidavit is that, the respondent was employed by the Applicant as a teacher at Majengo Secondary School under a fixed term of two years on 28th August 2016 ending on 28.8.2018. His monthly salary was to a tune of Tshs. 918,500/=. Upon expiring of the two-year contract the two sides agreed on an oral agreement of three months subject to renewal from 29th August, 2018 up till 15/7/2019. Before then they served him a letter on 10/6/2019 informing him the management had no capacity to sign a written contract due to the decreasing number of students in the school of which could no longer accommodate a large staff. In view thereof, his contract was to end on 15/7/2019.

The respondent was dissatisfied by the action taken and he, together with one Jacobo Chingole (who later on recused from the case) decided to file a labour dispute before CMA. The CMA decided in favour of the Respondent. Aggrieved by such Award, the Applicant has filed the instant application under the following grounds: -

i. That, the Honourable Arbitrator erred in law and fact for holding and finding that, the appellant did not follow fair procedures for termination of the Respondent's employment contract.

ii. That, the Honourable Arbitrator erred in law and fact for failure to resolve the issue properly.

iii. That, the Honourable Arbitrator erred in law and fact for failure to evaluate and address properly the evidence given during the hearing.

iv. That an award of CMA was against the weight of the evidence as a whole.

v. That, an award of the CMA was irrational, illegal, improperly procured and tainted with irregularity.

vi. That, an award of the Honourable Commission is totally confused and it is tainted with irregularity.

vii. That the Honourable Arbitrator erred in law and fact for awarding a month salary in lieu of notice, despite the fact that the Respondent was given a notice of not less than 30 days.

viii. That the Honourable Arbitrator erred in law and fact for awarding one month salary for annual leave, while the Respondent did not adduce evidence at CMA for annual leave.

ix. That, the Honourable Arbitrator erred in law and fact for awarding the Respondent the compensation of twelve months renumeration while the matter did not fall under the category of unfair termination but rather the breach of employment contract.

x. That the Arbitrator erred in law and fact for awarding the respondent Tshs. 13,421,600/= without any relevant evidence on record.

xi. That, the Arbitrator erred in law and fact for entertaining the labour dispute which was filed against the wrong and non-existing party in the eyes of the law.

In view of the foregoing the applicant prayed for the following orders: -

(1) That, this honourable court be pleased to call for the entire record, inspect and examine the record of the CMA of Kilimanjaro at Moshi and revise the finding and Award delivered on 23rd December, 2020 for being improperly procured, illegal, irrational, irregular, taint with errors and acted beyond jurisdiction.

(2) That, this honourable court be pleased to quash the said Award and make any other relevant and

appropriate order(s) in the circumstances of this application as this honourable court shall deem fit and just to grant in the interest of justice.

(3) Costs of the application be provided for.

When the matter was called up for hearing the parties submitted orally, the applicant dully represented by Mr. Tumaini Materu learned advocate whilst the Respondent enjoyed the services of Advocate Abel Otaro.

In support of the revision application, Mr. Materu preferred to argue on the following: - Submitting on the first ground on failure to evaluate the evidence, the learned advocate explained, there is ample evidence that the two sides could not enter into another contract due to the crimpling financial capacity. They had very few students as per exhibit RE3 (a letter) hence could no longer afford to ran the school. They were facing a drastic shortage of funds to pay salaries to the employees. Despite this glaring evidence the Arbitrator relied on the evidence of retrenchment which was not existing.

As for the second ground of appeal Mr. Tumaini complained on the reliefs granted under section 40 of Employment and Labour Relations Act, Cap 366 (hereinafter referred to as ELRA) by the Arbitrator 12 months

compensation, one month notice and one month salary which he claimed were granted despite the fact that the reason for termination was found valid. The learned advocate was of the view, in the event it was found the termination was valid but the procedure was not followed then, the Arbitrator could have awarded a lesser penalty as per the case of **Matilda Gerase Rwebugisa vs Blue Rock Spur Limited** which quoted with approval the case of **Sodetra (SPRL) Ltd vs Njellu Mezza and Another, Revision No. 207 of 2008** (Labour Division - Dar es Salaam).

On the same ground the learned advocate contended, the Arbitrator found valid reasons for termination and yet proceeds to award 12 months compensation and other reliefs in absence of evidence. He further explained in the counter affidavit the Respondent stated had he continued working, he could have been entitled to annual leave. To the contrary the learned advocate stated annual leave is granted to those still in service and not otherwise.

The learned advocate complained about the 15 days salary of Tshs. 562,600/= in that this was a big amount. The respondent's monthly salary was Tshs. 918,500/= and if calculated by dividing by 30 and multiplied by 15 you get Tshs. 459,200/= and not Tshs. 562,600/=

The learned advocate further contested the one month notice in lieu of termination for the reason that the respondent was served with a notice on 10/06/2019 that on 15/7/2019 the contract will come to an end. The same was within the prescribed period.

As for third ground of appeal the applicant's counsel argued, the award was improperly procured because the respondent had a fixed term of contract with no expectation of renewal. In view thereof the remedy was for breach of contract and not payment for unfair termination of 12 months. The learned advocate referred the court to appropriate law, (Rule 8(2) paragraph a, b, c of ELRA (Code of Good Practice G.N No. 2/2007) where Rule 8(2)(c) is for unfair termination and its remedy is 12 months remuneration while Rule 8(2)(a) is for breach of contract which fits in all fours with the respondent's case. He had a fixed contract whose remedy is breach of contract and for that granting him 12months compensation was unlawful. To this he invited the court to the case of **Mtambua Shamte and 64 others vs Care Sanitation Suppliers, Revision No. 154 of 2010 (High Court DSM Labour Division).**

Under the 4th ground of revision, the applicant's advocate raised the issue of locus standi and cautioned the Award

cannot be executed. He averred the applicant had no capacity to be sued rather the proper party was the applicant's Registered Trustees. He clarified, it is undisputed that the applicant is operating under the Registered Trustees as reflected in the counter affidavit and CMA exhibit CE2 which was the settlement deed and for that the Registered Trustees of the Catholic Diocese of Moshi was the proper party to be sued. Given such elaboration the remedy is to strike out the matter. He referred the court to the case of **Christina Mrimi vs Cocacola Kwanza Bottles Ltd (Civil Appeal No. 112 of 2008 (CAT DSM)** in support thereof.

On the 5th ground the advocate contended the Award was tainted with errors and it was not composed properly for the reasons that, the respondent's exhibits are not reflected in the award and it is difficult to understand what were the arguments. The learned advocate concluded his submission by calling upon the court to grant the application by striking out the Award.

Replying to the submission, the Respondent's advocate prayed the Counter Affidavit be adopted as part of his submission. Responding to the first ground on failure to differentiate between retrenchment and termination, the learned advocate contended that form No. 1 is very loud.

The claim was on unfair termination and that the procedure, was not followed. He argued that, he was surprised as to why the applicant was questioning the Arbitrator's reliance on Exhibit RE3. The same was referring to the reasons for termination being lack of funds which automatically led to "retrenchment".

Contesting the ground on compensation awarded for the reason that, it was a severe punishment, the learned advocate submitted, the reasons for awarding the same was pegged on section 40(1) of ELRA. The same provides for the minimum compensation awarded in law and for that he was of the view the Arbitrator was right in granting the amount thereof.

Thirdly, submitting on one month salary the Respondent's advocate stated annual leave is among the reliefs for unfair termination as per section 44(1)(b) of ELRA. He continued to argue the employee is entitled to annual leave even in absence of termination and the law provides for an avenue of the employer to buy off the annual leave.

Buttressing on the one month notice, the learned advocate submitted there is no evidence to prove that, the notice was issued and received by the Respondent a month before. He

had received the notice on 23/06/2019 in which he was to stop working on 15/7/2019 which is less than a month.

Regarding the 15 days award, the advocate explained the applicant was confusing the calculations based on basic salary and those on gross salary. Even though he did not dispute the amount of salary the respondent was receiving.

As to the grievances of compensation for breach of contract, he responded that from no. 1 reveals it is termination of contract and not breach of contract. He stated t whether it is fixed or unspecified contract it does not take away the nature of dispute. The applicant was wrong in believing it was a fixed oral contract of 3 months but did not prove the same at CMA. On the other hand, the Respondent proved that he had a two-year contract and upon renewal he got another 2 years contract which was terminated before expiry and for that he was entitled to 24 months compensation. Granting him a 12 months compensation was proper.

Responding on the issue of locus, the learned advocate submitted this argument is baseless. In civil cases one is allowed to raise Preliminary Objections at the commencement of a case but the applicant did not do so. The Applicant's advocate was all along defending the

applicant and the same counsel is the one who has filed the revision. He has never raised the issue of locus standi.

As to the issue of execution of the award the respondent's counsel stated, the matter should be let to go for execution. This is where it shall be dealt with.

The learned advocate continued to state, the applicant did not specify which evidence is lacking in the Award. Exhibit "CE2" which the applicant referred to formed part of evidence which the Arbitrator relied upon. The learned advocate called upon this court to pass through and examine the same, the court will find the applicant admitted was wrong and ready to compensate the Respondent before the CMA.

In concluding, he prayed for dismissal of the application.

In rejoinder, the applicant's advocate reiterated his submission in chief.

After passing through the submission by the parties and the CMA record, the following issues need determination of this court: -

i. Whether the applicant had no Locus standi
ii. Whether the reason for terminating the respondent's employment by the applicant was fair.

iii. Whether the procedure for retrenchment was fair.

iv. What remedies are parties entitled to?

On the issue of locus standi, the Applicant's advocate contended that the right party to be sued is the Registered Trustee of the applicant since the present Applicant has no capacity to be sued and for that the award cannot be executed. The Respondent's advocate stated this could have been raised as a Preliminary Objection at the CMA taking into account that the advocate was representing the Applicant right from the commencement of the dispute.

Having visited the contract of employment the parties are **CATHOLIC DIOCECE OF MOSHI** and **NICKSON N. MUNISI** and the same appears in the CMA records. From this point it appears that the Respondent sued the party to the contract. The learned advocate was representing the Applicant at the CMA level and he was in a better position to question the applicant's locus. To raise this issue at this stage is definitely an afterthought. The same was not raised at CMA to provide an opportunity to the adverse party to challenge the same. The case of **Christina Mrimi (supra)** cited is distinguishable with the present case in the sense that in the cited case there was failure to identify the name

of the appropriate party, unlike in this dispute where the party has been properly named and identified.

Secondly as to whether the respondent was terminated fairly, the Applicant's advocate argued the reason for termination was because they faced financial constraints and for that they could not enter into another contract. He argued that the Arbitrator relied on the operational retrenchment in absence of evidence. The court finds indeed, the Arbitrator was of the view that it was "operational retrenchment". He found the applicant had admitted the number of students had decreased putting the applicant in a financial crisis. This is seen at page 7 which for ease reference I wish to quote: -

> *"Tume ilienda mbele zaidi na kuona sababu hii ni kwa mujibu wa Kifungu 38 cha Sheria No. 6 ya 2006 kinachoelekeza usitishwaji wa ajira wowote kama matokeo ya uendeshaji ikiwapo kushindwa kuendelea na uendeshaji ni taratibu zipi zifuatwe ili kufikia ukomo wa ajira wa haki kwa wafanyakazi."*

According to rule 23(2) of the Employment and Labour Relations {Good of Good Practice} G.N No. 42 of 2007 the reasons for termination by operation requirement

(retrenchment) may be economical needs, technological needs or structural needs. Since the reason for ending the employment contract was economic hardship, it automatically falls under section 38 (1) of ELRA which is operational retrenchment. Therefore, the reason for retrenchment was valid and fair being among the valid reasons for termination as rightly decided by the Arbitrator.

The third issue then will be on **whether the procedure for retrenchment was fair**? Section 38 of ELRA provides for the procedures of termination based on operational requirements (retrenchment). Section 38 reads as follows: -

38.-(l) in any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be shall –

(a) Give notice of any intention to retrench as soon as it is contemplated;

(b) Disclose all relevant information on the intended retrenchment for the purpose of proper consultation;

(c) Consult prior to retrenchment or redundancy on-

(i) The reasons for the intended retrenchment;

(ii) Any measures to avoid or minimize the

intended retrenchment;

(iii) The method of selection of the employees to be retrenched;

(iv) The timing of the retrenchments; and

(v) Severance pay in respect of the retrenchments,

(d) Shall give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) Any trade union recognized in terms of section 67;

(ii) Any registered trade union with members in the workplace not represented by a recognised trade union;

(iii) Any employees not represented by a recognised or registered trade union

What is gathered from the above provision is that for retrenchment to be fair the employer must give notice of any intention to retrench; disclosure of all relevant information on the intended retrenchment; consult prior to retrenchment; and to give the notice of retrenchment. The

section is read together with rule 23 (1), (2), (3), (4), (5), (6) an (7) of the Employment and Labour Relations (Code of Good Conduct) Rules, G.N. No. 42 of 2007 which provides for the requirement of the law on the operational retrenchment of the employee by employer.

At page 8 of the Arbitral award the Arbitrator had this to say;

> *"'Nilipopitia Ushahidi wa mlalamikiwa ni Dhahiri suala hili la kushuka kwa hali ya uchumi kutokana na kupungua kwa idadi ya wanafunzi halikuwa la ghafla kiasi ambacho asingeweza kufuta taratibu halali na sahihi za kuhitimisha ajira ya mlalamikaji, isipokuwa ni kuchukulia mambo kirahisi bila kuzingatia sheria na taratibu. Mlalamikiwa alichokifanya ni kuendelea kumshikiria mfanyakazi huyu kwa kuwa alitambua umuhimu wake kwa kumbadilisha hata aina ya mkataba kutoka wa maandishi hadi kufika mkataba wa mdomo hiyo ni Dhahiri alitakiwa kuzingatia taratibu zote za kumpunguza mlalamikaji kwa kuzingatia sheria na kanuni zilizopo."*

According to Rule 23(4) of G.N. No. 42 of 2.007 it is a duty of the employer to make sure that the procedure for termination or retrenchment are followed. The employer

(applicant) in the present case failed to prove whether the procedure as per section 38(1)(a)(b)(c)(d) of ELRA was followed. Therefore, I join hands with the Arbitrator that the termination of the employee's employment was unfair procedurally.

Last on the issue of reliefs, the Arbitrator awarded the Respondent one month salary in lieu of notice, salary for 15 days, annual leave and 12 months compensation. Basing on the foregoing, the question will be ***what reliefs are granted where the employee is fairly terminated but procedural unfairly?***

The answer to this is found under section 37(2)(c) which I wish to quote: -

> *"37(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) that the employment was terminated in accordance with a fair procedure.*

The provision has defined what amounts to unfair termination. Since the procedure were not followed then as per section 37(2)(c) of ELRA this was a case for termination. Moreover, under **section 40 (1) of ELRA** read together with

rule 32 (5) (a)-(f) of the **Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N 67/2007**, the arbitrator is allowed to invoke his discretionary powers to award the appropriate compensation.

As to the complainant that the notice was served on time, I find that there is no proof the notice was served to the Respondent timely. It was the duty of Applicant to prove that the notice was served as required. The mere fact that the letter for termination was written on 10/6/2019 doesn't mean that it was effectively served on the Respondent in compliance with section 41(1)(b)(ii) of Employment and Labour Relations Act (supra) which provided for a notice of 28 days.

For 15 days salary, the Applicant did not lay down his basis of calculations as provided for under section 26(1) to (3) of ELRA read together with the 1st Schedule thereto, to substantiate the amount being suggested thereto. In view thereof I find no foundation upon which this court will rely upon to revise the same.

I wish to point out that the case of **Matilda Gerase Rwebugisa (supra)** cited by the Applicant's advocate is distinguishable to the present case. In the cited case it was only three months salaries granted considering the

applicant had been re-engaged for reason of business decline and restructuring unlike in this matter where the applicant was terminated completely and was to receive his terminal benefits.

In the circumstances, the revision is dismissed on grounds explained herein above.

It is so ordered.

B. R. MUTUNGI
JUDGE
23/06/2021

Judgment read this day of 23/6/2021 in presence of the Respondent and in absence of the Applicant dully notified.

B. R. MUTUNGI
JUDGE
23/6/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
23/6/2021